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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BISMARCK LOPEZ MARTINEZ, et al., Defendants and Appellants.	B167680 (Los Angeles County Super. Ct. No. VA071317)

APPEALS from judgments of the Superior Court of Los Angeles County, Dewey L. Falcone, Judge. Affirmed.

Geri L. Green, under appointment by the Court of Appeal, for Defendant and Appellant Bismarck Lopez Martinez.

Alan C. Stern, under appointment by the Court of Appeal, for Defendant and Appellant Cruz Talamantez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General, and Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

Bismarck Lopez Martinez and Cruz Talamantez appeal from the judgments entered following their convictions by jury of three counts of second degree robbery (Pen. Code, § 211; counts one through three) with admissions by Martinez that at the time of the offenses he was released from custody on bail (Pen. Code, § 12022.1) and had suffered a prior felony conviction (Pen. Code, § 667, subd. (d)) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)), and following Talamantez's convictions by jury of two counts of second degree robbery (Pen. Code, § 211; counts six and eight) and one count of attempted second degree robbery (Pen. Code, §§ 664, 211; count seven). Martinez was sentenced to prison for 15 years. Talamantez was sentenced to prison for seven years eight months.

In this case, we hold (1) there was sufficient evidence that Talamantez committed attempted robbery (count seven), (2) there was sufficient evidence that Talamantez committed three robberies (counts one through three), (3) the court did not prejudicially err by not disclosing information from officers' personnel files pursuant to Martinez's *Pitchess* motion, (4) there was sufficient evidence that Martinez committed two robberies (counts two and three), and (5) Martinez was not denied effective assistance of counsel as a result of his trial counsel's failure to request limiting instructions.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established, as to count eight,[1] that about 9:30 p.m. on April 24, 2002, Luis Lopez, a worker at a bakery located in an industrial area of Vernon, was walking to work on Loma Vista. Talamantez displayed a gun, and Talamantez and a confederate robbed Lopez of his wallet. The robbers told Lopez to keep walking, then left.

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[1] The sufficiency of the evidence as to count eight is undisputed. Miguel Hernandez was alleged to have committed the crimes at issue in counts four, five, and nine. He is not a party to this appeal.

Juan Reyes and Pablo Escalona[2] were the victims of counts six[3] and seven, respectively. Reyes testified that about 9:45 p.m. on May 28, 2002, Reyes and Escalona, coworkers at the bakery, were walking to work. Reyes testified he was on Loma Vista when he was "robbed" by two people. One had something that looked like a gun. There was only one gun; the other man did not have a weapon. A photograph, People's exhibit number two, depicted something that looked similar to the gun used to rob Reyes. The two men told Reyes to keep walking.

Reyes later testified that the two men demanded Reyes's wallet and took it from him. The following then occurred: "Q Now, where was Pablo when your wallet was taken from you? [¶] A The other guy had him. [¶] Q So one of the robbers was paying attention to you, and the other robber was paying attention to Pablo? [¶] A That's right. [¶] Q The robber that was paying attention to you, was he the man with the gun or the man with no gun? [¶] A No, the one who had the gun. [¶] Q And the man who had the gun, is he the same man that took your wallet from you? [¶] A Yes. [¶] Q Did either of the two men who robbed you ever hit you? [¶] A Yes."

The colloquy continued: "Q [t]he man who hit you, was he the man with the gun? [¶] A No, because the one who had the gun was with my coworker. [¶] Q [a]nd the man that didn't have the gun hit you? [¶] A Yes, because he wanted more money." The man who hit Reyes used the man's fist and struck Reyes over the left side of his mouth. The man hit Reyes after the man took Reyes's wallet.

Reyes did not see whether anything was taken from Escalona. Reyes testified he did not see because "the other guy hit me. And the one who had the pistol came back, and he was aiming at me." After Reyes's wallet was taken and he was struck in the face, the two assailants told Reyes and Escalona to keep walking. The two assailants left. Reyes never got his wallet back. At trial, Reyes identified Miguel Hernandez as the

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2 Escalona did not testify at trial.

3 The sufficiency of the evidence as to count six is undisputed.

gunman and Talamantez as the other man. Talamantez was the man who struck Reyes in the face.

During cross-examination, Reyes testified he looked at three or four photographic showups, and identified the person who hit him. During redirect examination, Reyes testified that he identified two of three men at a preliminary hearing as involved in the robbery, and the two were Hernandez and Talamantez.

Felipe Ramirez was the victim of count one.[4] The evidence established that on May 29, 2002, Ramirez, who worked at the bakery, was on 48th or 50th, walking home from work. Ramirez, wearing his white uniform, was with three coworkers, including Marcial Castillo Gutierrez.[5] Three men approached and passed Ramirez's group, then returned to Ramirez's group.

Ramirez testified that the three men "asked us for the money." One of the three men put a gun under Ramirez's arm. Ramirez surrendered his wallet to the gunman, and the gunman took Ramirez's cellular phone from his pocket. Police arrived and two of the three men fled. The third man remained with Ramirez for about five minutes. Ramirez testified that, during that period, the third man was telling Ramirez's group "not to say anything, that he was with the other guys." Ramirez testified he felt threatened by the third man because "he was telling us not to say anything, that he was with us."

Ramirez testified that, during a later field showup, he identified one of the two detainees as the "one who robbed me, . . ." Ramirez testified that he did not identify the other detainee at the field showup. However, Ramirez also testified that he told Vernon Police Officer Frank Menchaca that the second detainee was one of the robbers. Ramirez testified that, at the preliminary hearing, he identified the person who took Ramirez's cellular phone. Ramirez, who, at time of trial, was still afraid of the robbers, identified neither appellant at trial.

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[4] The sufficiency of the evidence as to count one is not disputed by Martinez but is disputed by Talamantez.

[5] Marcial Castillo Gutierrez is sometimes referred to by witnesses as Castillo or Gutierrez. We will refer to him as Gutierrez.

Flaviano Cordero was the victim of count two. Cordero, who worked at the bakery, testified that about 9:00 p.m. on May 29, 2002, he was walking home with coworkers Felipe, Emanuel, and Marcial.[6] Three persons approached Cordero's group and stopped it. The three took Cordero's wallet and a coworker's wallet. One of the three pointed a gun at Marcial. Cordero feared the gunman.

When police came, two of the three assailants fled. Cordero testified at trial that, at the preliminary hearing, he identified Martinez as one of the robbers. Cordero identified Martinez at trial as one of the robbers, but did not know if Martinez was the gunman. At time of trial, Cordero was still afraid of the robbers.

During cross-examination, Cordero testified that he told the police later that evening that, because it was dark, he could not identify anyone involved in the robbery. Still later, a detective showed photographs to Cordero, and Cordero told him that Cordero did not see anyone in the photographs who was involved in the robbery. Cordero testified at trial that he did not, during the preliminary hearing, identify Martinez as a robber. During redirect examination, Cordero testified that Martinez, Talamantez, and Hernandez were present at the preliminary hearing. Cordero gave conflicting testimony as to whether, at the preliminary hearing, he identified Martinez, Talamantez, and Hernandez as involved in the robbery.

Gutierrez was the victim of count three. Gutierrez testified that he worked for the bakery and that, about 9:00 p.m. on May 29, 2002, he was walking home on Loma Vista with Ramirez, Cordero, and Emanuel Calderon. Two or three men approached and stated, "'This is a robbery.'" Gutierrez testified that his group was surprised, and that "[w]e didn't know what to do . . . except to give them whatever we had." One of the assailants pointed a gun at someone in Gutierrez's group. Talamantez asked for Gutierrez's wallet. Gutierrez initially balked at surrendering his wallet, but Talamantez, who was not the gunman, hit Gutierrez in the head. Talamantez took Gutierrez's wallet.

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6 Marcial apparently refers to Gutierrez.

Martinez was also one of the robbers. Talamantez ran when police arrived, and he discarded Gutierrez's wallet.

Gutierrez testified that one of the robbers stayed with Gutierrez's group when police arrived, but Gutierrez did not remember very well.[7] The robber who stayed said not to say anything to police. Gutierrez's and his group were afraid of all three assailants. Gutierrez told police that one of the robbers was moreno, meaning black. An Hispanic person could be moreno. Gutierrez testified that Martinez looked like a mulatto. The day after the incident, Gutierrez identified the gunman, and the man who hit Gutierrez, in a photographic showup.

Emanuel Calderon was the victim in count nine. He testified that he worked for the bakery and that, during the evening of May 29, 2002, he was walking home from work when three people "came up to assault us." Calderon was with five coworkers, including Ramirez, Gutierrez, and Cordero. At trial, Calderon identified Hernandez and Talamantez as two of the three people who approached Calderon. Hernandez came closer to Calderon than Talamantez.

Hernandez wanted Calderon's wallet. Calderon was afraid. One of the three men who approached Calderon hit Gutierrez. Police arrived and two of the three assailants immediately fled. The prosecutor asked if that meant that one assailant stayed with Calderon for at least a brief period. Calderon replied that the third assailant, Talamantez, did not flee but, instead, stayed with Calderon and spoke to police. Talamantez told Calderon to keep quiet and to not say anything.[8]

Menchaca testified that on May 29, 2002, he and his partner, Vernon Police Officer Phillip Swinford, were conducting surveillance of Loma Vista and 49th due to several armed robberies that had occurred in that industrial area. Menchaca saw four

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[7] Gutierrez testified during cross-examination that the gunman, and the person who hit Gutierrez and to whom he surrendered his wallet, fled when cops arrived. A third person remained.

[8] A detective testified he showed photographic lineups to Ramirez, Cordero, Gutierrez, and Calderon, and none of them identified any defendant.

males walking southbound on Loma Vista towards 50th. Two persons, whom Menchaca identified at trial as Martinez and Hernandez, approached the four males from behind. Martinez and Hernandez appeared to say something to the four males to get their attention. The four males turned around towards Martinez and Hernandez, then put their hands up. At some point when the four males were facing Martinez and Hernandez, two or three persons approached, stood behind, and joined Martinez and Hernandez.

Menchaca drove to the location and, as he arrived, he observed Martinez take a cellular phone from one of the four males. Two others of the four males gave several items to Hernandez.

Menchaca ordered the assailants to lie down. Martinez and Hernandez fled. One assailant, whom Menchaca later at trial identified as Talamantez, stayed briefly. Talamantez stated, "'I'm a victim. They tried to rip me off[,]'" then fled. Martinez and Hernandez were later detained. As Menchaca took Martinez to a patrol car, Martinez stated, "'Hey, I know I robbed those guys, but the gun I used was plastic. It wasn't even real. I just robbed one guy for his cell phone, and that's the truth officer. I'm not lying. I ran because I got scared when you guys pulled up, and that's why I threw the gun over there.'"

Menchaca found People's exhibit number two, a plastic handgun, on a bush on the corner of Loma Alta and Fruitland, about 70 feet from where Martinez was found, and perhaps 30 feet from the incident. A black wallet was found in the street between Fruitland and 50th. Menchaca took Ramirez to a field showup where Ramirez identified Martinez as the gunman who robbed him.[9]

Swinford testified that on May 29, 2002, he was conducting surveillance with Menchaca. Swinford saw male subjects approach some workers. Swinford thought a crime was occurring and drove to the location. When he arrived, he observed four males surrounding a group of people. Two of the four males were yelling.

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[9] Ramirez also identified Hernandez as one of the robbers.

Swinford identified himself as a police officer. One of the four male subjects, whom Swinford identified at trial as Talamantez, put up his hands. The other males fled. Swinford testified that he asked Talamantez if he were a victim or suspect, and Talamantez "started to say suspect, and stopped and said victim." Police set up a perimeter and later detained Martinez and Hernandez. A cellular phone was found on Fruitland. At trial, Swinford identified Martinez and Hernandez as two of the four male subjects.

In defense, Talamantez's aunt testified that Lopez told her that Lopez was not sure of his identification of Talamantez. Martinez presented no defense evidence.[10]

CONTENTIONS

Talamantez contends: (1) "[t]here was insufficient evidence to support appellant's conviction on count 7, the attempted robbery of Escalona, since there was no evidence of any attempt to take anything from him" and (2) "[t]he evidence presented at trial to support appellant's convictions on count[s] 1, 2 and 3 was insufficient under either a theory that appellant was a direct perpetrator or an aider and abettor to these robberies."

Martinez contends: (1) "[t]he trial court committed reversible error in failing to review the personnel files it reviewed in camera for violence and excessive force"; (2) "[t]he evidence is legally insufficient to establish that appellant was the perpetrator of all three robberies and therefore it is legally insufficient to support the judgments of conviction on counts 2 and 3"; and (3) "[t]rial counsel rendered [ineffective] assistance of counsel in failing to request jury instructions limiting the evidence as to the other defendants and other counts to those defendants and those counts."

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10 Martinez and the People stipulated that a defense investigator determined that the distance from the northeast corner of Loma Vista and 49th to the northeast corner of Loma Vista and 50th was 324 feet.

DISCUSSION

1. *There Was Sufficient Evidence That Talamantez Attempted To Rob Lopez (Count Seven).*

Robbery "is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) An "attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (Pen. Code, § 21a.)

Talamantez concedes that "[t]he modus operandi evidence noted by respondent may well establish that there was an ongoing specific intent to commit a series of robberies." Moreover, Talamantez "does not dispute that the jury might have concluded based on that evidence, and the actual robbery of Reyes, that the intent element of this attempt crime [count seven] was established." Talamantez claims only that there was insufficient evidence of a "direct but ineffectual act done toward" the commission of robbery.

The robbery spree evidence was relevant not only to the issue of intent but to modus operandi. Leaving aside count seven, we note that, as to counts one through three, six, and eight, every time Talamantez and a confederate approached, contacted, and stopped a bakery worker(s) who was walking to or from home around 9:00 to 10:00 p.m. on Loma Vista, Talamantez or the confederate had a gun or a replica gun, and Talamantez and the confederate subsequently robbed the bakery worker(s).

The evidence established as to count seven that Reyes and Escalona, bakery workers, were walking to work together when they were approached, contacted, and stopped by Talamantez and his confederate Hernandez, the latter of whom had a gun.

Moreover, fairly read, the record reflects that when Hernandez took Reyes's wallet, Talamantez was then *paying attention* to Escalona, and Hernandez was paying attention to Reyes. Talamantez, unsatisfied with the take, demanded more money from Reyes and hit him. Talamantez hit Reyes but, by that time, Hernandez had left Reyes and *had gone to Escalona*, and Hernandez was *with* Escalona. Hernandez later came back

from Escalona to Reyes and aimed a gun at Reyes. There was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that Talamantez attempted to rob Escalona, including the requisite "direct but ineffectual act" towards the commission of robbery. (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; Pen. Code, §§ 664, 211.)

2. *There Was Sufficient Evidence That Talamantez Robbed Ramirez, Cordero, And Gutierrez (Counts One Through Three).*

The evidence established, and Talamantez concedes, that, on May 29, 2002, Ramirez (count one), Cordero (count two), and Gutierrez (count three) were robbed. As to all of these counts, the evidence from the victims established that three robbers were together when they approached the three victims, who were also together, and that all of the robbers, evidencing consciousness of guilt, fled after police arrived, some robbers fleeing immediately.[11]

Moreover, as to the robbery of Ramirez, he testified that three persons approached his group. Calderon identified Talamantez as one of three persons who approached to commit assault. Ramirez testified that, after his property was taken, two robbers fled and a third man stayed. Fairly read, the record reflects that that third man told Ramirez's group (1) not to tell police that the third man was with the robbers who had fled, and (2) that the third man was telling Ramirez's group that the third man was with Ramirez's group. Ramirez felt threatened by the third man.

Gutierrez testified that one of the robbers stayed with Gutierrez's group and said not to say anything to police. Calderon testified that Talamantez did not flee but, instead, stayed with Calderon, spoke to police, and told Calderon to keep quiet and to

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11 Penal Code section 31, states that "[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed." A "person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

not say anything. Menchaca testified that Talamantez stayed briefly. The jury reasonably could have concluded that (1) the third man referred to by Ramirez, (2) the person to whom Gutierrez referred as the robber who said not to say anything to police, and (3) Talamantez, identified by Calderon as the person who told Calderon to keep quiet and to not saying anything, and identified by Menchaca as the person who stayed briefly, were the same person. Moreover, as a result, the jury reasonably could have concluded that the third man, Talamantez, evidenced consciousness of guilt as to the Ramirez robbery by his willingness to fabricate his association with Ramirez's group, and by Talamantez's later flight. Further, Cordero testified at trial that, at the preliminary hearing, he identified Talamantez as involved in the robbery.[12]

Further still, Gutierrez identified Talamantez as the person who asked for Gutierrez's wallet, struck him, took Gutierrez's wallet, fled when police arrived, and discarded Gutierrez's wallet. The jury reasonably could have chosen to reject the circumstantial evidence, discussed above, that Talamantez was the third robber who delayed his flight, and reasonably could have concluded instead that Talamantez was the robber who took items from Gutierrez and immediately fled when police arrived. That is, the jury reasonably could have concluded that Talamantez's direct perpetration of the robbery of Gutierrez encouraged the robbery of Ramirez by Talamantez's confederates.

Beyond that, the jury reasonably could have concluded from Talamantez's statement to Menchaca, "'I'm a victim. They tried to rip me off[,]'" that Talamantez truthfully acknowledged that multiple robbers were involved, but falsely denied that he was one of them. Talamantez initially started to say to Swinford that Talamantez was a suspect, but Talamantez later said he was a victim.

As to the robbery of Cordero, Calderon testified that Talamantez was one of the three who approached to assault. Cordero testified at trial that, at the preliminary hearing, he identified Talamantez as involved in the robbery.[13] Moreover, as we

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12 As mentioned, Cordero gave conflicting testimony on this issue.

13 As mentioned, Cordero gave conflicting testimony on this issue.

similarly concluded in the case of the robbery of Ramirez, the jury reasonably could have concluded that Talamantez directly robbed Gutierrez, which encouraged the robbery of Cordero by Talamantez's confederates, or that Talamantez did not directly rob Gutierrez but was an accomplice who stayed behind and fabricated his noninvolvement with the Cordero robbery. Further, as previously discussed, the jury reasonably could have concluded that Talamantez's statements to Menchaca and Swinford implicated Talamantez in the robberies.

As to the robbery of Gutierrez, again, Calderon identified Talamantez as one of three persons who approached to commit assault. As we discussed previously (in the context of Talamantez's liability for the Ramirez robbery), the jury reasonably could have concluded that Talamantez directly perpetrated the Gutierrez robbery, but the jury also reasonably could have concluded that he did not directly perpetrate that robbery but was the third man who was an accomplice who stayed behind and fabricated his noninvolvement in the three robberies. Moreover, the jury reasonably could have concluded that Talamantez's statements to Menchaca and Swinford implicated Talamantez in the robberies. There was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that Talamantez robbed Ramirez, Cordero, and Gutierrez. (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; *People v. Beeman, supra,* 35 Cal.3d at p. 561; Pen. Code, §§ 664, 211.)

3. *The Court Did Not Prejudicially Err By Not Disclosing Information From Officers' Personnel Files Pursuant To Martinez's Pitchess Motion.*

a. *Pertinent Facts.*

On February 6, 2003, Martinez filed a pretrial discovery motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (hereafter, *Pitchess* motion), seeking from the Los Angeles County District Attorney, and Vernon Police Department, inter alia, all complaints relating to excessive force, "racial bias, ethnic bias, coercive conduct, violation of constitutional rights, false arrest, fabrication of evidence, [or] unlawful arrest" against Menchaca and Swinford.

The motion also sought all complaints of officer misconduct "amounting to moral turpitude . . . , including but not limited to allegations of false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, false testimony, perjury, using excessive force, making false arrests, writing false police reports to cover up the use of excessive force, and false or misleading internal reports including but not limited to false overtime or medical reports." Incident reports were attached to the motion.

The supporting declaration of Martinez's trial counsel indicated, inter alia, the following. Martinez was arrested by the officers for his alleged involvement in the robbery of three pedestrians. According to police reports, Menchaca observed what appeared to be a robbery in progress; Menchaca saw Martinez take a cellular phone from one victim and flee with two confederates when police arrived; and after Martinez was arrested, he told Menchaca, "'Hey, I know I robbed those guys, but the guns we used were plastic, they weren't even real. I just robbed one guy for his cell phone, the other guy with me robbed two guys and that's the truth officer, I am not lying.'"

In the supporting declaration, Martinez's counsel stated, on information and belief, that Martinez was not involved in the robbery, did not make the incriminating statement, and was subjected to a beating by, and racial epithets from, Swinford when Martinez refused to admit involvement in a robbery. When Martinez complained to Menchaca that Swinford had beaten Martinez, Menchaca indicated the matter was unimportant and told Martinez to sue the officers.

The supporting declaration stated, "[t]he defense may contend that both Officers Swinford and Menchaca have falsified police reports in an effort to cover up the beating of Mr. Martinez by Officer Swinford and to bolster a case against Mr. Martinez by claiming that they 1) observed conduct of Mr. Martinez which never occurred and 2) heard a confession by Mr. Martinez which was never made."[14]

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14 The supporting declaration stated, "[t]he defense has reviewed a copy of the video tape conversation only to find that the copy received is completely blank. A review of the copy in possession of the District[] Attorney's Office contains no conversation, but does show Mr. Martinez sitting alone in a jail interview room for approximately eight

The supporting declaration indicated that the requested materials would be used to locate witnesses to testify that "the officer" had, inter alia, a character trait of using excessive force and lying; witnesses would testify as to specific instances of same; and such evidence was relevant to show that the officers had a propensity to engage in excessive force or morally turpitudinous conduct.

The declaration also indicated that an officer using excessive force was not in the performance of the officer's duties, evidence of such force was relevant to establish self-defense, and such evidence was morally turpitudinous conduct with which the officer could be impeached. The declaration further indicated that "Such information would also be used by the defense to effectively cross-examine the officer at trial, and for impeachment purposes where appropriate. Additionally, such information would be used by the defense in the discovery of other admissible evidence." The City of Vernon (City), Menchaca, and Swinford opposed the motion.

At the February 26, 2003 hearing on the motion, the court, after discussing the contents of the *Pitchess* motion, stated, "My tentative is to grant on the basis of a prima facie showing of good cause, as to both officers, any citizens' complaints made within the past 5 years, number 1, as far as filing false reports; and, number 2, as to any complaints as to force or violence against any detainees." The City, Menchaca, and Swinford, urging the court to deny the motion, argued Martinez had not shown materiality or good faith, the officers performed good police work in making the arrests, there was no indication in the police reports that force was used, and there was no indication that officers falsified reports. Said parties argued, in the alternative, that the court should grant the motion subject to protective orders.

The court indicated it would hear from Martinez, and stated, "If my tentative stands, we'll go in camera. I'll look to see what information is available." After

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minutes. I have further attempted to review the original tape recording at the Vernon Police Department, yet three different video cassette players would not play the original tape. The defense may argue that this is further evidence of an effort to keep the truth from being revealed."

argument by Martinez, the court stated, "My tentative will be the ruling. And we will go in camera to conduct an inquiry as to those two police officers as to the two areas I've indicated."[15] The court then conducted the in camera hearing. The transcript of the in camera hearing was ordered sealed.

Later, in open court, the court stated, "[t]he court has conducted an in camera hearing regarding any records in the past 5 years as to citizens[']' complaints against Vernon Police Officers Menchaca and Swinford. [¶] The areas, based upon the supporting declaration of the Pitchess motion that the court was concerned with, as to whether or not Officer Menchaca had filed any false reports . . . there were no such complaints as to false reports as to Menchaca. [¶] And then based upon the supporting declaration, the other area was whether or not any citizens' complaints were made as to Officer Swinford as to force or violence against any detainees or arrestees. And there were no reports disclosed as to that particular police officer."

b. *Analysis.*

Martinez claims the erroneous denial of his *Pitchess* motion prevented an intelligent defense at the hearing on his motion to suppress his statement to Menchaca and at trial.

In *People v. Memro* (1985) 38 Cal.3d 658 (*Memro*), our Supreme Court stated, "Evidence Code section 1043 outlines the procedure for requesting discovery of peace officer personnel records. That statute requires a 'good cause' showing by affidavit setting forth the materiality of such information, and an allegation that the governmental agency identified in the request 'has such records or information . . . .' [Fn. omitted.] [¶] Once this procedure has been complied with and notice has been provided to the agency having custody of the records, the trial court conducts an *in camera* examination of the material to determine its relevance to the case at hand. Certain information is immune from disclosure, while other information may be released according to the guidelines

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15 Martinez does not claim that the trial court erred to the extent it did not find that Martinez showed good cause for the disclosure of other categories of information.

provided in Evidence Code section 1045. [Fn. omitted.]" (*Memro*, *supra*, 38 Cal.3d at pp. 678-679.)

In the present case, the record, fairly read, reflects that, at the hearing on Martinez's *Pitchess* motion, the court ruled that he made a good cause showing for the disclosure of *two* categories of complaints against Menchaca: (1) complaints that he filed false reports, and (2) *complaints that he had used force or violence against a detainee.* However, after the ensuing in camera hearing, the court indicated that it "ha[d] conducted an in camera hearing" "regarding any records . . . as to citizens[']s complaints" against Menchaca in "the area[]" of whether he had "filed any false reports[.]" The court did not then state that it had conducted an in camera hearing regarding complaints that Menchaca used force or violence against a detainee.

In short, arguably, the trial court (1) erroneously failed to conduct an in camera hearing to determine whether there were complaints that Menchaca used force or violence against a detainee and, (2) to the extent, if any, a relevant discoverable complaint(s) of such force or violence was produced during the in camera hearing, the trial court erroneously failed to order its disclosure. However, there is no need to decide these issues.

It is settled that an accused must demonstrate that prejudice resulted from a trial court's error in denying discovery. (*Memro*, *supra*, 38 Cal.3d at p. 684.) Moreover, "the proper standard of analysis regarding whether a defendant was prejudiced from the denial of a discovery motion is to determine if there was a reasonable probability that the outcome of the case would have been different had the information been disclosed to the defense." (*People v. Hustead* (1999) 74 Cal.App.4th 410, 422 (*Hustead*).)

As our Factual Summary, and part 4, *infra*, of our Discussion reveals, much of the ample evidence that Martinez committed the offenses alleged in counts two and three came from the testimony of persons other than Menchaca and Swinford. In his *Pitchess* motion, Martinez sought complaints that Menchaca used force or violence against a detainee, because (1) such force or violence was relevant to the issues of whether Menchaca was in the performance of his duties and whether Martinez acted in self-

defense, and (2) such force or violence was relevant to impeach Menchaca. However, whether Menchaca was in the performance of his duties, and whether Martinez acted in self-defense, were irrelevant to counts two and three.

Moreover, Martinez had an opportunity to thoroughly cross-examine Menchaca at trial. Further, after the in camera hearing, the court indicated in open court that three reports were produced as to Menchaca during the in camera hearing. The transcript of the in camera hearing was ordered sealed. We have reviewed that sealed transcript,[16] which transcript constitutes an adequate record of the trial court's review of any document(s) provided to the trial court.

It is true that Martinez made a pretrial motion to exclude his incriminating statement to Menchaca. During the hearing on that motion, the court considered whether Martinez's statement was "properly Mirandized versus a voluntary statement."[17] The evidence established that Martinez's incriminating statement was volunteered on his own initiative and not the product of police interrogation. The court found that the statement was voluntary and spontaneous.

However, the mere fact, if true, that a defendant makes a pretrial motion to exclude a defendant's statement on the ground, as urged below, that the statement was obtained without a proper *Miranda* advisement, or on the ground that the statement was otherwise coerced, does not mean that a trial court's previous denial of a *Pitchess* motion necessarily prevented an intelligent defense at the exclusion hearing. This is not a case in which Martinez, as part of his good cause proffer in his *Pitchess* motion, claimed that Menchaca or Swinford used coercion, excessive force, or violence *to obtain from Martinez the incriminating statement he made to Menchaca*. (Compare *Memro*, *supra*, 38 Cal.3d at pp. 674, 680-684.) In his *Pitchess* motion, Martinez, claiming Menchaca was fabricating, in effect denied making the incriminating statement at all. Martinez has

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16 The sealed transcript has been transmitted to this court.

17 It is not clear whether, by the word "voluntary," the court meant uncoerced, or volunteered on Martinez's initiative and not the product of interrogation.

failed to demonstrate that any erroneous denial of his *Pitchess* motion prevented an intelligent defense at the exclusion hearing.

Moreover, this is not a case in which the trial court summarily denied a *Pitchess* motion because the defendant failed to show good cause, with the results that (1) the trial court did not hold an in camera hearing, (2) we could have no idea as to whether complaints existed against Menchaca or Swinford, and (3) remand might be appropriate. (Compare *Hustead*, *supra*, 74 Cal.App.4th at p. 418.) Instead, in our case, an in camera hearing was held, the trial court, after the in camera hearing, observed that there were three reports as to Menchaca and none as to Swinford, and we have read the sealed transcript pertaining to the in camera hearing.

We hold that, even if the trial court erroneously denied Martinez's *Pitchess* motion by failing (1) to conduct an in camera hearing to determine whether there were complaints that Menchaca used force or violence against a detainee, and (2) to order the disclosure of any relevant discoverable complaint(s) of such force or violence produced during the in camera hearing, no prejudicial error occurred. (Cf. *Memro*, *supra*, 38 Cal.3d at p. 684; *People v. Watson* (1956) 46 Cal.2d 818, 836; *Hustead*, *supra*, 74 Cal.App.4th at p. 422.)

4. *There Was Sufficient Evidence That Martinez Robbed Cordero And Gutierrez (Counts Two And Three).*

Martinez makes no sufficiency claim as to count one, and concedes "the evidence, if believed, . . . points to his robbing Mr. Ramirez" (count one). Moreover, Martinez concedes that Talamantez and Hernandez committed crimes, and that the Ramirez (count one), Cordero (count two), and Gutierrez (count three) robberies occurred concomitantly. However, Martinez claims there is no evidence that the three assailants were together or that Martinez did anything other than rob Ramirez. We disagree.

The evidence established, and Martinez concedes, that, on May 29, 2002, Ramirez, Cordero, and Gutierrez were robbed. As to all of these counts, the evidence from the victims established that three robbers were together when they approached the

three victims, who were also together, and that all of the robbers, evidencing consciousness of guilt, fled after police arrived, some robbers fleeing immediately.

Moreover, as to the robberies of Cordero (count two) and Gutierrez (count three), there was substantial evidence as follows. Ramirez testified that three assailants asked "us" for the money. Ramirez testified Gutierrez was one of the coworkers with Ramirez. Cordero testified he was with Ramirez. Gutierrez testified he was with Ramirez and Cordero. Thus, Ramirez, Cordero, and Gutierrez were together, therefore, the three assailants asked Cordero and Gutierrez, not just Ramirez, for money. Martinez concedes Cordero was robbed. Ramirez told Menchaca during a field showup that Martinez was the gunman. Cordero identified Martinez at the preliminary hearing as one of those three assailants.[18] Cordero identified Martinez at trial as one of the assailants.

Gutierrez testified that two or three men approached and said, "'This is a robbery.'" Gutierrez's group did not know what to do so they gave "them" whatever Gutierrez's group had. Talamantez took Gutierrez's wallet. Gutierrez testified at trial that Martinez was one of the robbers.

According to Menchaca, Martinez was one of the group of four assailants who initially contacted the victims. Menchaca saw Martinez take a cellular phone from a victim. Martinez fled when police arrived, evidencing consciousness of guilt. Martinez told Menchaca, inter alia, "'. . . I know I robbed those guys, . . .'" and Martinez claimed that the gun he used was plastic. Menchaca found a plastic gun near the location of the robberies, and near the location where Martinez was found after he fled. Swinford identified Martinez as one of the four male subjects who accosted the coworkers. There was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that Martinez robbed Cordero and Gutierrez. (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; *People v. Beeman, supra,* 35 Cal.3d at p. 561; Pen. Code, §§ 664, 211.)

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18 As mentioned, there was conflicting evidence on whether, at the preliminary hearing, Cordero identified Martinez.

5. *Martinez Did Not Receive Ineffective Assistance Of Counsel.*

Martinez, Talamantez, and Hernandez (not a party to this appeal) were each convicted on counts one through three of committing second degree robbery against Ramirez, Cordero, and Gutierrez, respectively. Hernandez alone was convicted on each of counts four and five of committing robbery,[19] and on count nine of committing attempted robbery against Calderon. Talamantez and Hernandez were each convicted on counts six and seven of committing robbery and attempted robbery against Reyes and Escalona, respectively. Talamantez alone was convicted on count eight of robbing Lopez.

Martinez contends his trial counsel rendered ineffective assistance by failing to request jury instructions limiting the evidence pertaining to other defendants and their counts to said defendants and counts. We disagree. There is no dispute that Martinez's trial counsel failed to request such instructions. However, to establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. On appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective assistance contention must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

In the present case, the record sheds no light on why counsel failed to act in the manner challenged, counsel was not asked for an explanation concerning the issue, and we cannot say there simply could have been no satisfactory explanation.

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19 Counts four and five each involved a victim not previously discussed. The offenses underlying those counts occurred on May 29, 2002.

Moreover, to the extent Martinez's contention pertains to counts one through three against Talamantez,[20] the evidence pertaining to those counts was relevant and admissible on the issue of whether Martinez, who was also charged in those counts, committed those offenses directly or as an accomplice. Further, the court, using CALJIC No. 17.02, instructed the jury that it was to consider each count separately. Further still, there was ample evidence of Martinez's guilt on each of counts one through three. We reject Martinez's ineffective assistance contention. (Cf. *People v. Slaughter*, *supra*, 27 Cal.4th at p. 1219; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, J.

We concur:

KLEIN, P.J.

ALDRICH, J.

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[20] The record does not reflect whether Hernandez was convicted or acquitted on the counts alleged against him.